SUPREME COURT, U. S.

APR 18 1968

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1177

NATIONWIDE MUTUAL INSURANCE COMPANY, *Appella*

v.

LARS VAAGE, CLINTON JAMES LEWIS, CLINTON A. LEWIS, JOSEPHINE MONACO and FELIX N. MONACO, individually, and as parents of MICHELLE MONACO, an infant of the age of 14 years, SAMUEL C. WILLIAMS and ARTHUR WILLIAMS, JOHN J. MCCLOSKEY, Sheriff of the City of New York, WILLIAM J. RICE, JR., Sheriff of the County of Albany, GEORGE F. SPIKE, Sheriff of the County of Yates, NELSON A. ROCKEFELLER, Governor and LOUIS J. LEFKOWITZ, Attorney General, respectively, of the State of New York, as representatives of the Sheriffs of all other counties in the State of New York, and HENRY ROOT STERN, JR., Superintendent of Insurance of the State of New York, *Appellees.*

Appeal From the United States District Court for the Southern District of New York

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

CHARLES G. PILLON
Counsel for Appellant
420 Lexington Avenue,
New York, N. Y. 10017
Area Code (212) MU 9-5350

Of Counsel:

THOMAS A. ZIEBARTH
816 National Press Bldg.
Washington, D. C. 20004

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1177

NATIONWIDE MUTUAL INSURANCE COMPANY, *Appellant*,

v.

LARS VAAGE, CLINTON JAMES LEWIS, CLINTON A. LEWIS, JOSEPHINE MONACO and FELIX N. MONACO, individually, and as parents of MICHELLE MONACO, an infant of the age of 14 years, SAMUEL C. WILLIAMS and ARTHUR WILLIAMS, JOHN J. MCCLOSKEY, Sheriff of the City of New York, WILLIAM J. RICE, JR., Sheriff of the County of Albany, GEORGE F. SPIKE, Sheriff of the County of Yates, NELSON A. ROCKEFELLER, Governor and LOUIS J. LEFKOWITZ, Attorney General, respectively, of the State of New York, as representatives of the Sheriffs of all other counties in the State of New York, and HENRY ROOT STERN, JR., Superintendent of Insurance of the State of New York, *Appellees*.

Appeal From the United States District Court for the Southern District of New York

---

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

The pending motion to dismiss the instant appeal, made solely on behalf of the appellees Governor, Attorney General and Superintendent of Insurance of the State of New York, is founded upon the erroneous analysis of the lower

court that since none of the persons named as defendants were impairing Nationwide's constitutional rights, injunctive relief was futile. Thus, the movant contends that the Sheriffs who, under the statutes in question, are the only persons authorized to execute orders of attachment and levy upon property are mere "ministerial officers", having no discretion in the manner of executing such orders, and that it is really the order of attachment itself which offends the appellant's rights. This being so he apparently continues, the appellant is completely without an effective remedy in this instance, because it would be compelled to institute separate federal court actions with respect to each order of attachment, as and when issued, and to request the federal court to enjoin the operation of each order. Obviously, this would be tantamount to enjoining the prosecution of pending state court actions which the federal courts are, as a general rule, precluded from doing. 28 USC § 2283.

But this analysis disregards the actual attachment mechanism. The order of attachment merely *authorizes and directs* the Sheriff to make a levy. It does *not* limit or restrict him as to the property upon which he is to make the levy; that is accomplished by the New York statute which defines the "property" and "debts" which may be attached, as such terms may be interpreted and construed from time to time by the courts of New York, such as was done in the *Seider* case in holding that automobile liability policies were property which *could* be attached by sheriffs. But while sheriffs may now levy upon such policies, they are by no means compelled to do so. In the language of the statute (CPLR § 6214, p. B-6)*: "The sheriff shall levy upon any interest of the defendant in personal property, or upon any debt owed to the defendant . . .". More-

---

* Reference to pages of the Appendix to the Jurisdictional Statement.

over, his levy cannot be of unlimited scope, but only upon so much of the property of the defendant as will satisfy the plaintiff's demand, and excess property can be released. *Buxbaum* v. *Assicurazioni Generali,* 175 Misc. 785, 25 N.Y. Supp. 2d 357. Thus, it is the sheriff's choice—and his choice alone—of attaching an automobile policy of Nation-wide which results in an invasion of its constitutional rights. Sheriffs are properly to be regarded as "state officers" in this instance; they are the "effective means of the enforcement or execution of the challenged statute"; and the instant case was properly before the three-judge court, and before this Court on appeal. *Moody* v. *Flowers,* 387 U.S. 97, 87 S. Ct. 1544, 18 L.Ed. 2d 643. As explained more fully in the Jurisdictional Statement (p. 14), although the sheriffs are admittedly the primary parties in interest, the Governor, Attorney General and Superintendent of Insurance of New York were joined as parties defendant as representative of the sheriffs of the 57 counties of the State of New York, and to eliminate the necessity of having to serve each of the sheriffs personally. Moreover, as there explained, the Governor of the State of New York possesses the power to remove all sheriffs of the State of New York, and thus he could, through this removal power, insure the effectiveness of a court order enjoining sheriffs from levying upon automobile liability policies. The Attorney General, of course, while not an indispensable party to this action, is the chief law officer of the State of New York authorized to issue legal opinions as to the duties of public officers throughout the State, including sheriffs, and he could, through the performance of this function, insure the implementation of the court's injunction. For this reason, and because he is required to be served with all papers in the three-judge proceeding, he was joined as a defendant. Finally, the Superintendent of Insurance was joined because of his concern with and responsibility for the regulation of the business of insurance in the State of New York.

As noted above, none of the other parties to this proceeding, including the Sheriff of the City of New York, where a substantial portion of the attachment "business" exists, has chosen to move to dismiss the instant appeal. If this Court believes that the Governor, Attorney General and the Superintendent of Insurance are not proper parties to this proceeding, it could, it is submitted, dismiss such appeal as against these parties, but continue it as against all other parties.

CONCLUSION

The motion to dismiss the appeal should be denied in all respects, or in the alternative, dismissed as against the Governor, Attorney General and Superintendent of Insurance and continued as against all other parties.

Respectfully submitted,

CHARLES G. PILLON
Counsel for Appellant

Of Counsel:

THOMAS A. ZIEBARTH
816 National Press Bldg.
Washington, D. C. 20004